Supreme Court, U.S.
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No. 00-1700

In The

Supreme Court of the United States

U-HAUL INTERNATIONAL, INC., ET AL.,

Petitioners,

v.

KAREN ROMANO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred by holding that Petitioners failed to preserve the various legal theories that they ask this Court to consider by (1) failing to seek proper jury instructions, and (b) failing to object to the re-submission of the damages issues to the jury?

2. Whether Petitioners have forfeited their right to present their "common law" theories of agency liability by changing legal theories at each level of the courts below?

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STATEMENT OF THE CASE

Karen Romano ("Romano") worked at the Waterville, Maine U-Haul Center from May 1 through May 15 or 16, 1996. Neither the classified advertisement to which she responded, nor the paperwork which she completed at the time of hire, nor anything at the Waterville Center location indicated that she was employed by U-Haul Company of Maine ("UHCM"). Transcript 88, 90-91, 93, 254.[1] Romano understood that she was employed by "U-Haul," not by UHCM. Tr. 88-92. UHCM is a wholly-owned subsidiary of U-Haul International, Inc. ("UHI") (collectively "U-Haul" or "Petitioners"). Following her hire, Romano received a "Welcome Aboard" handbook published by UHI and signed by UHI's President. The handbook invited Romano to present any complaints of discrimination to UHI.

In its decision, *Romano v. U-Haul International, Inc.*, 233 F.3d 655, 667-68 (1st Cir. 2000), the Court of Appeals summarized the relationship between UHI and UHCM as follows:

> (1) U-Haul Company of Maine is owned in its entirety by U-Haul International; (2) the two companies share three directors; (3) U-Haul International receives revenues from U-Haul of Maine's transactions as well as a daily report of the same; (4) U-Haul International establishes equipment rental rates; (5) U-Haul International provides accounting services to U-Haul of Maine; (6) U-Haul International provides legal,

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[1] All references to the trial transcript are denoted hereinafter as "Tr." followed by the page number.

> marketing, budgeting, accounting, and training services to U-Haul of Maine; (7) there is interchange of employees between the two companies; and, most importantly, (8) U-Haul International sets human resources and personnel policies, establishes the wage scale, the pay day, and all fringe benefits, must approve pay in excess of the scale, limits shift premiums and the hours of part-timers, processes payroll, prohibits payroll advances, must approve any rehire, maintains duplicate personnel records, and invites employees of U-Haul of Maine to present complaints concerning discrimination, sexual harassment and leaves of absence to U-Haul International's Human Resources Department . . . Further, there were multiple examples of U-Haul International's involvement in employment-related matters.

On Romano's second work day, the Waterville Center manager received a phone call from UHCM President Paul Smedberg questioning Romano's hire as a hitch mechanic. Following the call, the local manager told Romano that U-Haul "didn't want women installing hitches, that women are supposed to be working in the main office." Tr. 109-10. Four work days later, the local manager terminated Romano, stating "they came in over [my] head" and that "The only problem you have is you sit when you pee." Tr. 120, 122-23. The local manager subsequently told Romano's then-husband, her father, and the man hired to replace Romano that the termination was discriminatory.

Romano initially sued UHI as the lone defendant for violation of Title VII. UHI moved for summary judgment,

asserting that UHCM was Romano's employer. UHI conceded in its summary judgment brief that in some instances a parent company could be liable for the acts of its subsidiary under either a single ("integrated enterprise") or joint employer theory. After Romano amended her complaint to add UHCM as a defendant, the District Court denied summary judgment, indicating that factual issues relating to the determination of the proper defendants would be resolved at trial.

Before the trial began and at the charge conference, the District Court ruled that it would instruct the jury on the four-factor integrated enterprise test to determine whether UHI controlled UHCM's operations to such an extent that UHCM's actions were attributable to UHI. U-Haul did not object to instructing the jury on the integrated enterprise test or to the special verdict question, asserting only that the trial court should give greater emphasis to the control factor and should also instruct on U-Haul's proposed "joint employer" theory. Petitioners *never* raised any agency argument in response to the trial court's proposed instructions.

The jury returned a verdict awarding $0 compensatory damages, $15,000 nominal damages, and $625,000 punitive damages. Believing that the jury had confused compensatory and nominal damages, the District Court charged the jury again on these issues without specific objection by U-Haul. After further deliberation, the jury returned a verdict switching the compensatory and nominal damage awards. On July 15, 1999, the District Court entered judgment for Romano of $15,000 in compensatory and $285,000 in punitive damages after reductions to

conform with the damage caps. See 42 U.S.C. § 1981a(b)(3).

In post-trial motions, Petitioners again failed to make any agency argument. U-Haul's new post-trial counsel declared at argument on the motions, "And I think the memoranda filed by the parties show that the parties don't necessarily disagree as to the standard or the factors that should be considered when determining whether there, in fact, was [an] integrated employer, but we do disagree on the emphasis or the importance of the particular factors." Appendix 363. The District Court denied the post-trial motions and entered an amended judgment in Romano's favor on October 29, 1999.

On appeal, the First Circuit concluded that Petitioners had waived their agency argument and that the failure to instruct on this theory was not plain error. The Appeals Court noted that the majority of the circuits have adopted or applied the integrated enterprise test. The Appeals Court further concluded that the District Court had accurately set out the four factors of the integrated enterprise test but had failed to give proper emphasis to the control prong. However, the First Circuit stated, based on the facts quoted above, "Even if the instruction had emphasized the control of employment prong, it is not apparent that the jury would have reached a different conclusion" and therefore, the Appeals Court found the error to be harmless. *Romano*, 233 F.3d at 668. The Appeals Court further concluded that the District Court had given a proper instruction on punitive damages and had not erred in resubmitting the compensatory and nominal damages verdicts. Accordingly, the Appeals Court affirmed the District Court's decision in full. The

panel and the Appeals Court rejected a subsequent Motion for Rehearing and Rehearing en banc. This petition for writ of certiorari followed.

REASONS FOR DENYING THE WRIT

I. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS FAILED TO PRESERVE FOR REVIEW THE INTEGRATED ENTERPRISE AND AGENCY LAW ISSUES.

The First Circuit held that Petitioners' "argument that the integrated-enterprise test should not have been applied and that agency principles should have been substituted has been forfeited for failing to meet the requirement of Rule 51 and for failing to bring the issue before the District Court at any time during the proceedings."[2] *Romano*, 233 F.3d at 665. As the Appeals Court noted, it treats seriously the procedural requirements of Rule 51. *Id.* at 663 ("The requirement that the grounds for objecting to a jury instruction must be distinctly stated is treated seriously by this Court."). Petitioners, however, apparently believe that the Supreme Court of the United States is less serious about violations of the Federal Rules of Civil Procedure. They do not directly challenge the First Circuit's determination that they violated Rule 51 and thus have forfeited the issues that they now present

[2] Fed. R. Civ. P. 51 provides in pertinent part: "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."

for review. Petitioners ask this Court to overlook their procedural missteps at trial and to ignore the unchallenged rulings of the First Circuit as to those procedural errors. This Court should decline so brazen an invitation to usurp both the Rules and the lower courts.

In fact, this Court treats with utmost seriousness violations of Rule 51. See *Palmer v. Hoffman*, 318 U.S. 109, 119-20 (1943) (a general exception to partially erroneous jury instruction not sufficient to preserve error for appeal). It will consider issues not properly raised in the courts below only in "exceptional cases or particular circumstances . . . where injustice might otherwise result." *Hormel v. Helvering*, 312 U.S. 522, 557 (1941). This is not such a case. And, as the First Circuit pointed out, Petitioners are not entitled to the exception carved out in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). See *Romano*, 233 F.3d at 664. Unlike in *City of Newport*, the District Court here never had the opportunity to consider Petitioners' arguments that the proper test to determine whether UHI was Respondent's employer is some variant of agency law, not the integrated enterprise test.[3]

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[3] The First Circuit characterized Petitioners' "common-law agency" argument as "entirely unclear." *Romano*, 233 F.3d at 662 n.6. The "agency" argument Petitioners advance before this Court is no less obscure. Prior to trial, Petitioners proposed a jury instruction (Request No. 8) to the effect that UHI could only be found to be Romano's employer if it were found to be UHCM's agent. At trial, U-Haul abandoned this request in favor of the integrated enterprise or joint enterprise test. Then, in their brief to the First Circuit, U-Haul's third set of counsel switched tack, urging the Court to adopt the "common-law analysis" purportedly set forth in *Papa v. Katy Indus.*, 166 F.3d 937 (7th Cir.), *cert. denied*, 528 U.S. 1019 (1999). In *Papa*, however,

This Court normally declines to consider questions presented in a petition for certiorari that have not been considered by the lower courts, *Patrick v. Burget*, 486 U.S. 94, 99, n.5 (1988), citing *Youakim v. Miller*, 425 U.S. 231, 234 (1976), or where petitioners advance arguments that are inconsistent with or contrary to the positions adopted at trial. *City of Newport*, 453 U.S. at 274 (Brennan, Justice, dissenting); see also, *Canton v. Harris*, 489 U.S. 378, 384-385 (1989) ("It is true that petitioner's litigation posture with respect to the questions presented here has not been consistent . . . respondent did not inform us prior to the time that review was granted that petitioner had

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the question before the court was whether the parent was the *principal* – a 180 degree flipflop from the argument U-Haul initially had made, then abandoned, in its pre-trial request. Now, before this Court, "agency" has undergone yet a third permutation. In arguing that "Supreme Court precedent mandates construction of Title VII under common-law agency principles," Petitioners cite with particular emphasis this Court's decision in *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318 (1992), where the Court defined "employee" under ERISA pursuant to the master-servant relationship, as further defined by Restatement (Second) of Agency, Section 220. Under that definition, the issue of whether UHI is UHCM's agent, or vice-versa, is jettisoned, and Petitioners instead argue that UHI can only be found to be Respondent's employer if the traditional master-servant analysis applies. "Agency" has been a moving target in this litigation, and Petitioners have never focused their argument to allow the courts below to effectively grapple with it, much less decide it. Failure to define the issues is a separate ground for denying certiorari in this case. See *Canton v. Harris*, 489 U.S. 378, 385 (1989) ("These various presentations of the issues below might have been so inexact that we would have denied certiorari had this matter been brought to our attention at the appropriate stage in the proceedings").

arguably conceded this point below"). This important principle is informed by the Court's interest in fair and effective trial administration, as well as by the need to husband this Court's "scarce judicial resources." *City of Newport*, 453 U.S. at 256; *Canton*, 489 U.S. at 384. In the case at bar Petitioners violated this sound policy by violating Rule 51. Petitioners not only did not advance their agency argument to the District Court, but also have taken inconsistent positions in the courts below both as to the integrated enterprise issue and as to whether principles of agency law are the exclusive means of determining who the employer is in the parent/subsidiary context for Title VII purposes.

Petitioners now argue that the District Court erred when it applied the integrated enterprise test to determine whether UHI was Respondent's employer under Title VII. But, as the First Circuit found, and Petitioners do not dispute, "[t]hroughout these proceedings, U-Haul repeatedly made the argument that either the integrated-enterprise test or the joint-enterprise test should apply." *Romano*, 233 F.3d at 663. Indeed, in their Memorandum of Law in Support of their Motion for a New Trial, Petitioners continued to press the integrated enterprise test, arguing only that the trial court erred in applying this test by failing to emphasize the second factor – centralized control of labor relations – of the four-part analysis of this test. If it was error to proceed on the integrated enterprise theory (which Respondent denies), it was invited error of which Petitioners ought not to be heard to complain: "When an appellant's 'tactics backfire[ ]' he cannot complain of error he induced: 'a defendant cannot

have it both ways.' " *Johnson v. Immigration and Naturalization Service*, 971 F.2d 340, 343 (9th Cir. 1992), quoting *U.S. v. Reyes-Alvarado*, 963 F.2d 1184, 1187 (9th Cir. 1992).

Similarly, Petitioners have been anything but consistent in arguing that common-law agency principles are the *only* basis upon which UHI, as the parent corporation, can be found to be Respondent's employer. At trial Petitioners advanced two alternative theories – integrated enterprise and joint employer – neither of which is grounded in common-law agency principles. And, as noted *supra*, footnote 3, before the Court of Appeals Petitioners championed the analysis in *Papa*, 166 F.3d at 197, a case where the Seventh Circuit outlined *three* separate bases for finding a parent corporation liable for the torts of its subsidiaries, only one of which is arguably grounded in common-law agency principles. Petitioners did not restrict their reliance on *Papa* to the putative agency analysis in that case. Now, before this Court, while arguing the exclusive applicability of agency law principles, Petitioners fault the lower court's application of the integrated enterprise test as an unwarranted displacement of applicable state law of corporations, suggesting that, in addition to agency law, the law of corporations also informs the determination of "employer" under Title VII, an argument not previously advanced.

The scatter-shot approach that has characterized Petitioners' trial and appellate postures is perhaps a reflection of the fact that Petitioners have employed three separate sets of attorneys in this litigation – at trial, in post-trial motions, and upon appeal to the First Circuit. This is not a criticism of Petitioners' right to counsel. But

error, not strategy, should be the basis for a petition for certiorari. Petitioners can point to no error by the lower courts. Certiorari ought to be denied.

II. THERE ARE NO COMPELLING REASONS FOR GRANTING CERTIORARI.

"A petition for writ of certiorari will be granted only for compelling reasons." Supreme Court Rule 10. Rule 10 outlines several "considerations" that the Court considers "compelling reasons." None of the issues raised by Petitioners rise to the level of "compelling reasons."

A. There Is No Conflict Between The District Court's Application Of The Integrated Enterprise Test And Supreme Court Precedent.

Petitioners cite a number of decisions of this Court for the proposition that only common-law agency principles can be used to determine whether a parent corporation is an employer of its subsidiary's employees for Title VII purposes. If those cases truly stood for that proposition, then arguably the District Court's use of the integrated enterprise test might conflict with this Court's precedent. In fact, however, Petitioners misstate the import of this Court's decisions in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992). *Meritor*, *Faragher*, and *Ellerth* address the circumstances under which an employer can be held vicariously liable for the acts of its undisputed employees. *Nationwide* addresses the definition of

"employee" under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.* None of these cases concern the definition of "employer" under Title VII. Thus, the First Circuit's decision here to apply the integrated enterprise test does not conflict with this Court's precedent.

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), did not concern the employer issue in the parent/subsidiary context. In that case, the issue before this Court was whether the employer, a bank, was liable for the sexual harassment inflicted upon an employee by a supervisor employed by the bank. This Court found that the appeals court below had erred in concluding that employers automatically are liable for sexual harassment by their supervisors. The Court cited the definition of "employer" in 42 U.S.C. § 2000e(b), which includes any "agent" of an employer, as evidence that Congress intended to place some limits on the acts of employees for which employers under Title VII are to be held responsible. It is in that context that the Court stated "[C]ongress wanted courts to look to agency principles for guidance *in this area.*" *Meritor*, 477 U.S. at 72 (emphasis added). The Court was not suggesting that agency principles are to be used to determine whether a parent corporation is the employer of its subsidiary's employees.

Similarly, in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), there was no issue as to the identity of the employer. In *Ellerth*, the Court had to decide "whether an employer has vicarious liability when a supervisor creates a hostile work environment by making explicit threats to alter a subordinate's terms or conditions of

employment, based on sex, but does not fulfill the threat." *Ellerth*, 524 U.S. at 754. The *Ellerth* Court examined agency principles of vicarious liability for harm caused by misuse of supervisory authority. Nowhere did the Court direct the lower courts to look to agency law to determine the identity of the employer in the parent/subsidiary context. It simply was not an issue.

In *Faragher*, 524 U.S. at 775, the issue before the Court was whether the employer, the City of Boca Raton, could be held vicariously liable for the conduct of two of the employee's immediate supervisors who had created a sexually hostile environment. The Court applied common-law agency principles to find that the City was vicariously liable for the torts of its supervisors. Again, there was no issue as to the identity of the employer.

In *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318 (1992), the issue before this Court was whether the putative employee was, in fact, an "employee," as defined in the ERISA statute. The Court mandated that the matter be resolved by applying an agency law definition of "employee." Petitioner extrapolates from this holding that since the "[d]efinitions [of "employer" and "employee"] are . . . mirror images of each other," therefore agency principles must be used to define "employer" in the Title VII context. The problem with this argument is that the Court in *Darden* did not address the definition of *employer* in Title VII. It did articulate a general principle of construction that "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer . . . that Congress means to incorporate the established meaning of these terms." *Darden*, 503 U.S. at 322,

quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-740 (1989). That interpretative principle must be tempered, however, by the caution issued by this Court in *Meritor*, 477 U.S. at 72, that "common-law principles may not be transferable in all their particulars to Title VII . . . ". See also *Kolstad v. American Dental Association*, 527 U.S. 526 (1999) (modifying agency standard for purposes of determining liability of employer for punitive damages for acts of its employees). The definition of "employer" in the parent/subsidiary context is one such area where agency principles are not readily transferable. That explains why the courts in virtually every federal circuit have resorted to some variant of a "single employer" test, in addition to common-law agency principles, to identify the "employer" for Title VII purposes in the parent/subsidiary context.[4]

Moreover, it is an inaccurate characterization of the Court's holding in *Darden* that the Court "instructed" that "tests created under the NLRA to judge employer-employee status should be rejected in favor of common law agency principles." Petitioners' Brief at p.7. The Court issued no such instruction.[5] Rather it noted that

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[4] The list of cases cited by Petitioners in their Brief at pages 13-15 is only partial. A more complete listing can be found at Shauna Wagner, *Annotation: Propriety of Treating Separate Entities as One for Purposes of Determining Number of Employees Required by Title VII of Civil Rights Act of 1964 (42 U.S.C.A. § 2000e(b)) for Action Against Employer*, 160 A.L.R. Fed. 441 (2000).

[5] Indeed, in its recent decision in *Pollard v. E.I. duPont de Nemours & Co.*, No. 00-763 (U.S., June 4, 2001), this Court found it helpful, in determining whether front pay is to be considered as a compensatory damages award under Title VII, to seek

prior interpretations of "employee," not by the NLRB, but by the Court itself, could no longer be relied upon in light of subsequent amendments by Congress of the National Labor Relations Act.

Finally, Petitioners argue that the integrated enterprise test conflicts with *Kolstad*, 527 U.S. at 526. However, as the First Circuit noted:

> The Supreme Court has not addressed the issue of whether the integrated-enterprise test is appropriate in Title VII cases. The Court's decision in *Kolstad* does not change this, and U-Haul's reliance on this case is misplaced. Although *Kolstad* observed that Congress directed federal courts to interpret Title VII using agency principles, it only analyzed application of agency principles in the context of punitive damages and 42 U.S.C. § 1981a. *See* 527 U.S. at 539-46. The Court did not address single-employer issues at all;. . . .

Romano, 233 F.3d at 664. The First Circuit had it right. This Court has not addressed the integrated enterprise issue, nor is there any need to do so given the near unanimity as to the use of the test and given Petitioners' consent to try the case on this theory. Consequently, there can be no conflict between the Supreme Court and lower federal courts that apply that test.

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guidance from the language of a similar provision in the National Labor Relations Act, noting that the two provisions "closely tracked" each other.

B. Neither The District Court Nor The First Circuit Displaced Maine's State Law Of Corporations.

Petitioners' *Erie* doctrine argument was 1) never advanced at trial; 2) never advanced in post-trial memoranda; 3) never advanced in its brief to the First Circuit; and 4) never advanced at oral argument. Not until Petitioners filed their Petition for Panel Rehearing and Petition for Rehearing En Banc after the Court of Appeals issued its decision did Petitioners raise this issue. Pursuant to Fed. R. App. P. 40(a)(3), Respondent was not permitted to file a response. Therefore the issue was never fully briefed and neither lower court had the opportunity to pass on this issue. This is a new theory that ought not to be entertained for the first time on a petition for certiorari. *Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988).

C. The Decision Of The First Circuit Is Not In Conflict With The Decision Of Any Other United States Court Of Appeals On The Same Important Matter.

Petitioners advance as a compelling reason for granting certiorari an alleged conflict among the Circuits on an important question of federal law. That is not the standard set forth in Supreme Court Rules, Rule 10(a). In relevant part, Rule 10(a) provides (emphasis added):

> [a] United States Court of Appeals has entered a decision in conflict with the *decisions* of another United States Court of Appeals on the same important matter;. . . .

This Rule contemplates something more than a general "split" among the Circuits on some important issue; at a

minimum, the decision upon which the Petitioners seek certiorari must actually conflict with a decision of another Circuit Court of Appeals. See, e.g., *Kolstad*, 527 U.S. at 526 (granting certiorari to resolve a conflict between decisions rendered by the District of Columbia Court of Appeals and the Second Circuit concerning the circumstances under which a jury may consider a request for punitive damages under 42 U.S.C. § 1981a(b)(1)); *PGA Tour, Inc. v. Martin*, No. 00-24 (U.S., May 29, 2001) (granting certiorari to resolve direct conflict between Seventh and Ninth Circuits over issue whether permitting use of golf cart would fundamentally alter golf competition). Such is not the case here.

Petitioners cite decisions from all federal circuits that have adopted or applied one or more "tests" to determine "employer" status under Section 1981a. But the First Circuit decision in *Romano* is in conflict with none of these. Contrary to Petitioners' representations, the First Circuit did *not* "reject[ ] the agency test in favor of the " 'integrated enterprise' test," nor did that court "adopt[ ]" the integrated enterprise test. Petitioners' Brief at 9, 13. Rather, the First Circuit merely found that the District Court did not commit plain error in applying the integrated enterprise test, given Petitioners' waiver of the agency test. *Romano*, 233 F.3d at 665. This decision, therefore, does not place the First Circuit in conflict with any other circuit court decisions, whether those courts may have adopted the integrated enterprise test or rejected it.

Petitioners have failed to demonstrate the requisite conflict between the First Circuit's decision and any other decision of the federal appeals courts. To grant certiorari in the absence of such conflict would open the door to

parties to bootstrap their petition on unrelated conflicts among the circuit courts to gain review here. Certiorari ought to be denied.

D. Petitioners Raise No Important Question Of Federal Law That Should Be Settled By The Supreme Court.

The final "compelling reason" urged upon this Court for granting certiorari is to settle an important question of federal law, namely, the alleged failure of the lower federal courts "[t]o realize that this Court's decisions in *Meritor, Ellerth, Faragher, Kolstad,* and [*United States v.*] *BestFoods* [524 U.S. 51 (1981)] are in *direct* conflict with application of the integrated enterprise test in Title VII cases." Petitioners' Brief at p. 15. (emphasis added). Petitioners proceed to cite a litany of evils that this Court can abate by granting certiorari and settling this important question of federal law. Romano will not respond to this list of putative ills simply because, as pointed out above, there is no conflict between Supreme Court jurisprudence and the lower federal courts in the application of the integrated enterprise test in Title VII cases. Absent that conflict, the litany of ills catalogued by Petitioners, whether real or conjured, will not be resolved by the Court addressing an imagined conflict that does not exist.

III. THE FIRST CIRCUIT DID NOT COMMIT ERROR IN AFFIRMING THE AWARD OF PUNITIVE DAMAGES AGAINST PETITIONERS AS A SINGLE EMPLOYER.

A. The First Circuit Correctly Found That The Award Of Punitive Damages Was Consistent With *Kolstad*.

Petitioners argue that, in the parent/subsidiary context, *Kolstad* requires "a separate analysis and finding as to *both* UHI's state of mind and UHI's good faith efforts to comply with Title VII." Petitioners' Brief at p. 22 (emphasis in original). This argument is no more than an attempt to re-litigate the identity of the "employer" at the damages stage of the litigation. *Kolstad* requires no such thing since that case did not arise out of or address the parent/subsidiary context. *Kolstad* held that punitive damages are available under Section 1981a only where the actor engaged in the discriminatory practice with malice or reckless indifference to the federally protected rights of an aggrieved individual. Principles of agency law must be used to impute punitive damages liability to the *employer* of the tort-feasor. However, even if, under agency law principles, an *employer* could be found vicariously liable for punitive damages for the torts of its managerial agent, it can escape this liability where it can demonstrate that the discriminatory actions of its managerial agent were contrary to the *employer's* good faith efforts to comply with Title VII.

The principles announced in *Kolstad* address the vicarious liability of the "employer." The First Circuit properly applied those principles to UHI/UHCM as the

"employer," once those entities had been found to be an integrated enterprise or a single employer and, as such, Romano's employer. That fact having been established, *Kolstad* did not require delving into the parent corporation's state of mind as if it were a separate entity for purposes of awarding punitive damages. As the First Circuit concluded, *Romano*, 233 F.3d at 664, Petitioners' reliance on *Kolstad* is simply misplaced.

B. Petitioners Waived The Issue Of Whether The District Court Erred In Re-Submitting The Compensatory And Nominal Damages Questions To The Jury.

U-Haul's argument that damages are not available under Title VII absent actual injury or compensatory damages and that nominal damages are unavailable altogether under Section 1981a hinges upon Petitioners' allegation that the trial court erred in re-submitting the compensatory and nominal damages questions to the jury. The trial court returned the verdict to the jury for further consideration of its initial awards of compensatory and nominal damages after it determined that the returned verdict form appeared to evidence confusion on the part of the jury concerning those two concepts. The First Circuit found that Petitioners had waived the re-submission issue by failing to object at the appropriate time. *Romano*, 233 F.3d at 670-671. Petitioners do not challenge this holding. As a consequence of the waiver of the re-submission issue, the First Circuit applied a "plain error" standard to determine the appropriateness of the re-submission. Finding no error, the court affirmed the compensatory damages award made by the jury after re-

submission, which provided, in turn, an adequate basis under the statute for the punitive damages award.

Petitioners fail to allege, much less demonstrate, that the First Circuit applied the wrong legal standard to determine the appropriateness of the re-submission or that it misapplied the "plain error" standard of review. Absent that threshold showing of error, there is no basis for review by this Court. Since the jury *did* award compensatory damages, punitive damages are clearly available under Title VII. And since the jury awarded compensatory damages, and not nominal damages, the issue of whether nominal damages are available under Section 1981a does not even arise. Certiorari ought to be denied.

IV. THE FIRST CIRCUIT'S HOLDING THAT PETITIONERS WAIVED THEIR ARGUMENTS AGAINST APPLICATION OF THE INTEGRATED ENTERPRISE TEST TO DETERMINE WHETHER UHI WAS ROMANO'S "EMPLOYER" DOES NOT IMPLICATE THE SUBJECT-MATTER JURISDICTION OF THE LOWER COURTS IN THIS CASE.

Romano established to the satisfaction of the jury that UHI was her employer. That essential fact, whether jurisdictional or not, was thus established at trial.[6] Accordingly, UHI's novel subject matter jurisdiction argument is devoid of merit.

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[6] As the First Circuit noted, "Appellants have not been clear whether they are challenging the submission of the [integrated enterprise] question to the jury or the finding by the jury." *Romano*, 233 F.3d at 668 n.8.

Even assuming, *arguendo*, that "employer" under Title VII were jurisdictional, the *test* whereby such a putatively jurisdictional fact is proven is not jurisdictional. Petitioners cite no case law to support the contrary proposition. The First Circuit did not hold that Petitioners waived their "right" to put Respondent to the proof that UHI was her employer, but only that Petitioners waived their ability to argue that one test for establishing employer status ought to be applied in the place of another. Petitioners ought not to be allowed to bootstrap this narrow holding into a challenge to the subject-matter jurisdiction of the lower courts. Certiorari ought to be denied.

CONCLUSION

Petitioners agreed below that the integrated enterprise test or the joint employer test was the appropriate test to determine what entity was Karen Romano's employer. This Court should not now grant certiorari to hear agency arguments which Petitioners have waived. No conflict exists over the application of the integrated enterprise test between the decision of the First Circuit in *Romano* and any other circuit. The *Kolstad* and subject-matter jurisdiction arguments advanced by Petitioners are simply an attempt to re-litigate the appropriateness of the integrated enterprise test. Finally, having waived the appropriateness of the resubmission issue, Petitioners' arguments that the punitive damages award is not supported by compensatory damages and that nominal damages are unavailable under Title VII do not merit

consideration. Accordingly, the petition for certiorari should be denied.

Respectfully submitted,

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